Boustead Plantations Bhd & Anor v Kadam ak Embuyang & Ors and other appeals (suing on behalf of themselves and 163 other proprietors, occupiers, holders and claimants of Native Customary Rights (NCR) land situated at Sg Kelimut, Kanowit District also known as Block D1 in Kanowit District)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02–1053–05 OF 2012, Q-02–1054–05 OF 2012 AND Q-01–282–06 OF 2012

BALIA YUSOF, TENGKU MAIMUN AND VARGHESE GEORGE JJCA

7 JULY 2014

Civil Procedure — Appeal — Appellate intervention — Misappreciation of facts — Whether judge misappreciating facts and misdirecting herself on relevant law — Whether appellate intervention merited

Contract — Parol evidence — Interpretation of agreement — Whether historical background admissible in determining importance of term in contract

Evidence — Parol evidence rule — Interpretation of agreement — Whether historical background admissible in determining importance of term in contract

Land Law — Customary land — Native customary rights — Whether infringed — Project to development native customary land with government agencies — Land owners not obtaining returns from land development — Whether agreement in connection thereto deemed null and void — Whether plaintiffs deprived of their rights and privileges — Whether plaintiffs to be given back their rights over native customary lands — Whether plaintiffs estopped by their own acquiescence and consequent events

The central issue in this action was whether the plaintiffs' native customary rights over certain lands ('the NCR land') had been infringed by certain transactions that had taken place with respect to development of the NCR land. The plaintiffs were natives of Sarawak. The state in August 1996 launched a scheme to develop NCR land into cultivated plantations in collaboration with the private sector. In 1997/1998 the NCR land owners including the plaintiffs, individually issued to the state separate 'memorandum of consent' (the MOC) wherein the Land Custody and Development Authority ('the LCDA'), a statutory body established under the Land Custody and Development Authority Ordinance 1985 ('the Ordinance') was appointed by

the landowners as the 'managing agent' of their lands. On 6 May 1998 the fourth defendant ('the BPB') entered into a joint venture agreement ('the JVA') with the first defendant ('PHSB') to develop the NCR land into an oil palm plantation. It was expressed in the JVA that LCDA had nominated PHSB to undertake the venture and PHSB was entering into the JVA as 'trustee' for the NCR land owners. On 14 January 2002 an agreement titled 'Principal Deed' ('the deed') was entered into between the state, PHSB and all the relevant NCR land owners. The deed set-out the rights, duties and obligation as between the parties, vis a vis the development of the NCR land. A copy of the JVA was appended to the deed. Pursuant to the Land (Dealing in Native Area Land)(Authorisation)(No7) Direction 2011 (made under s 9(1)(d) of the SLC and the Delegation of Powers (Dealing in Native Area Land) Notification 1995, the *Majlis Mesyuarat Kerajaan Negeri* ('MMKN') declared PHSB as a native of Sarawak effective from 1 December 1995. Pursuant to the Land (Dealing in Native Area Land)(Authorisation)(No 21) Direction 2011, the MMKN declared that the fifth defendant (the joint venture company incorporated by PHSB and BPB ('the JVC')) as a native of Sarawak effective from 6 May 1998. The only returns or dividends that had been received by the NCR land owners since 1996 were certain payments in 2008–2011, that too, after protests had been mounted by groups of land owners, who had complained that they had seen no returns in respect of their interest in the NCR land which had by then been fully planted and productive. The learned trial judge ('the judge') made the following orders:(a) that the first and third defendants were negligent in not ensuring that the investor did their part to profitably develop the NCR land as guaranteed by the defendants to the plaintiffs; (b) in view of the breach in trust of the first and third defendants vis a vis the plaintiffs, the deed and any agreement in connection thereto were deemed null and void; (c) the plaintiffs be given back their rights over the said NCR land; (d) the deed was null and void and of no legal effect vis a viss 8 of the Sarawak Land Code (Cap 81)('the SLC'); and (e) the first defendant to cease operations and vacate the NCR land within 15 days. In striking down the deed as being illegal for contravention of s 8 of the SLC, the judge took the position that the saving provisions of s 9(1)(d) allowing for a non-native to be deemed a native by order of the MMKN could only apply prospectively and not retrospectively. Hence the judge found that Directions Nos 7 and 21 were ineffective as on the date the deed was executed by the NCR land owners, neither PHSB nor the JVC were natives or deemed as natives under the SLC. PHSB, the state, BPB and the JVC appealed against the judge's decision.

Held, allowing the appeal with no order as to costs:

(1) The judge had misappreciated the facts and had further misdirected herself on the relevant law in arriving at her conclusions and in granting the declarations and orders as the court did. This was a case that merited appellate intervention in the circumstances (see para 24).

(2) The judge had failed to give any or any sufficient consideration to the MOC. The consent and authorisation given by the NCR land owners by way of the MOC was a material fact that constituted the background to the physical entry into and subsequent development of the NCR lands by the JVC. It also put into proper perspective the subsequent JVA and the deed that had been entered and it was relevant as well for a judicious appreciation of the terms of the deed (see paras 25 & 28).

(3) While in law a contract reduced into writing had to be construed objectively, it is still recognised that the background that led to the entry of the private contract could also be relevant and taken into consideration nevertheless (see para 27).

(4) The *gazetted* directions in so far as it deemed PHSB and JVC as natives had validity retrospectively. Firstly, the prohibitions vide s 8 were expressly subject to the provisions of s 9 and, secondly, there was nothing in s 9(1)(d) which stipulated that the notification thereunder was only to have effect prospectively (see para 31).

(5) The JVA was annexed to the deed, and its terms expressly included reference to the project being implemented by the JVC and wherein the NCR landowners' equity shareholding was duly acknowledged to be 30% of that specific entity. The plaintiffs who were parties to the deed were fully cognisant of these facts (see para 38).

(6) 'Estoppel' had been raised by PHSB, the state, BPB and the JVC in resisting the action brought by the plaintiffs and the judge had rejected that defence solely on the basis, that estoppel could not be invoked in an illegal transaction prohibited by law or that any attempt to contract out of clear statutory provisions will be void and wholly ineffective as being contrary to public policy. Since, the entry into the deed by the NCR landowners was not in contravention of s 8 of the SLC, it followed that the defence of estoppel was therefore available and open to the defendants. The plaintiffs were estopped on the facts and by the plaintiffs' own acquiescence and consequent events, and thereby were not entitled to be granted the relief sought by them (see paras 42–43 & 45).

(7) There was no basis on the facts to arrive at the conclusion that the privileges and rights of NCR landowners had been reduced to 'zero' or had been 'relegated to nought' by the arrangements entered into with PHSB and the state to develop the NCR lands into an oil palm plantation on a collective basis. The evidence before the court was obviously to the contrary (see para 48).

(8) The land in question was to remain a 'native area land'. As per the terms of the deed, where the land had already been alienated a memorandum of sublease would be executed and where a document of title was to be issued, it would be issued in the name of the JVC but for a term of 60

years, whereafter the NCR landowners had the residual right to have it alienated to themselves or their recognised heirs. In return for this arrangement, the NCR landowners would collectively hold 30% of the issued shares in the JVC, divided amongst them in proportion to their respective interest in the overall land under development. Their personal interest in the land would continue in the form of shareholders with a 30% stake in the JVC, which was to undertake the development and management of the oil palm cultivated on the NCR land. The judge was in error to take the position that the plaintiffs had been deprived totally of their rights and privileges outright or their rights have been assigned out absolutely or wholly to the JVC (see paras 49–50 & 52).

[Bahasa Malaysia summary

Isu utama dalam tindakan ini adalah sama ada hak adat anak negeri plaintif-plaintif ke atas tanah-tanah tertentu ('tanah NCR') telah dicabuli akibat transaksi tertentu yang berlaku berkaitan pembangunan tanah NCR itu. Plaintif-plaintif adalah anak Negeri Sarawak. Pada Ogos 1996 kerajaan negeri telah melancarkan skim untuk membangunkan tanah NCR untuk menjadi ladang yang diusahakan dengan kerjasama sektor swasta. Pada 1997/1998 pemilik-pemilik tanah NCR itu termasuk plaintif-plaintif, secara individu telah mengeluarkan 'memorandum of consent' ('MOC') yang berasingan kepada kerajaan negeri di mana Lembaga Pembangunan dan Lindungan Tanah ('LPLT'), satu badan berkanun yang ditubuhkan di bawah Ordinan Lembaga Pembangunan dan Lindungan Tanah 1985 ('Ordinan itu') telah dilantik oleh pemilik-pemilik tanah sebagai 'Managing Agent' tanah-tanah mereka. Pada 6 Mei 1998 defendan keempat ('BPB') telah memasuki perjanjian usahasama ('PUS') dengan defendan pertama ('PHSB') untuk membangunkan tanah NCR menjadi ladang kelapa sawit. Adalah dinyatakan dalam PUS bahawa LPLT telah mencalonkan PHSB untuk melaksanakan usaha itu dan PHSB memasuki PUS sebagai 'trustee' bagi pemilik-pemilik tanah NCR. Pada 14 Januari 2002 perjanjian bertajuk 'Principal Deed' ('surat ikatan') telah dimasuki antara kerajaan negeri, PHSB dan semua pemilik-pemilik tanah NCR yang berkaitan. Surat ikatan itu menyatakan hak-hak, kewajipan-kewajipan dan tanggungjawab-tanggungjawab antara pihak-pihak, vis a vis pembangunan tanah NCR itu. Sesalinan PUS itu telah dilampirkan dengan surat ikatan itu. Menurut Land (Dealing in Native Area Land)(Authorisation)(No7) Direction 2011 (yang dibuat di bawah s 9(1)(d) KTS dan Delegation of Powers (Dealing in Native Area Land) Notification 1995, Majlis Mesyuarat Kerajaan Negeri ('MMKN') telah mengisytiharkan PHSB sebagai anak Negeri Sarawak berkuat kuasa mulai 1 Disember 1995. Menurut Arahan Land (Dealing in Native Area Land)(Authorisation)(No7) Direction 2011, MMKN mengisytiharkan defendan kelima (syarikat usaha sama yang ditubuhkan oleh PHSB dan BPB ('SUS itu')) sebagai anak Negeri Sarawak berkuat kuasa mulai 6 Mei 1998. Hanya hasil atau dividen yang diterima oleh pemilik-pemilik tanah NCR sejak 1996 adalah bayaran-bayaran

tertentu dalam tahun 2008–2011, yang mana itu pun, selepas bantahan daripada kumpulan pemilik-pemilik tanah, yang telah mengadu bahawa mereka tidak mendapat hasil berkenaan faedah mereka dalam tanah NCR itu yang mana pada masa itu telah pun diusahakan dan mendatangkan hasil. Hakim perbicaraan yang bijaksana ('hakim') telah membuat perintah-perintah berikut: (a) bahawa defendan-defendan pertama dan ketiga cuai kerana tidak memastikan pelabur melaksanakan bahagian mereka untuk membangunkan dengan mendatangkan keuntungan tanah NCR itu sebagaimana dijamin oleh defendan-defendan kepada plaintif-plaintif; (b) berdasarkan pelanggaran amanah defendan pertama dan defendan ketiga vis a vis plaintif-plaintif, surat ikatan itu dan mana-mana perjanjian berkaitannya adalah dianggap terbatal dan tidak sah; (c) plaintif-plaintif dikembalikan hak-hak mereka ke atas tanah NCR tersebut; (d) surat ikatan itu adalah terbatal dan tidak sah dan tidak mempunyai kesan undang-undang vis a vis s 8 Kanun Tanah Sarawak (Bab 81) ('KTS') ke atas tanah NCR tersebut; dan (e) defendan pertama memberhentikan operasi dan mengosongkan tanah NCR dalam tempoh 15 hari. Dalam membatalkan surat ikatan itu sebagai menyalahi undang-undang kerana bertentangan dengan s 8 KTS, hakim telah mengambil kedudukan bahawa peruntukan kecualian s 9(1)(d) membenarkan seorang yang bukan anak negeri dianggap sebagai anak negeri melalui perintah MMKN hanya boleh terpakai secara prospektif dan bukan kes belakang. Justeru hakim itu mendapati Arahan-Arahan No 7 dan No 21 tidak berkuat kuasa pada tarikh surat ikatan itu dilaksanakan oleh pemilik-pemilik tanah NCR, PHSB dan SUS itu bukan anak negeri atau dianggap sebagai anak negeri di bawah KTS. PHSB, kerajaan negeri, BPB dan SUS itu telah merayu terhadap keputusan hakim itu.

Diputuskan, membenarkan rayuan tanpa perintah berhubung kos:

(1) Hakim tidak menilai fakta dan selanjutnya salah arah berhubung undang-undang relevan dalam membuat kesimpulan beliau dan dalam memberikan deklarasi dan perintah sebagaimana yang dilakukan mahkamah. Ini adalah kes yang mewajarkan campur tangan rayuan dalam keadaan itu (lihat perenggan 24).

(2) Hakim telah gagal memberikan apa-apa pertimbangan mencukupi kepada MOC. Persetujuan dan kebenaran yang diberikan oleh pemilik-pemilik tanah NCR melalaui MOC adalah fakta penting yang menjadi latar belakang kepada kemasukan fizikal dan pembangunan selanjutnya ke atas tanah NCR itu oleh SUS. Ia juga meletakkan dalam perspektif yang betul tentang PUS berikutnya dan surat ikatan yang telah dimasuki dan ia adalah relevan juga bagi kesedaran kehakiman tentang terma-terma surat ikatan itu (lihat perenggan 25 & 28).

(3) Jika dari segi undang-undang kontrak dibuat secara bertulis hendaklah ditafsirkan secara objektif, ia masih diiktiraf bahawa latar belakang yang

membawa kepada kemasukan kontrak persendirian juga adalah relevan dan walaubagaimanapun telah diambil kira (lihat perenggan 27).

(4) Arahan-arahan yang *diwartakan* setakat mana ia menganggap PHSB dan SUS sebagai anak negeri mempunyai kesahan secara kebelakang. Pertama, larangan melalui s 8 dengan jelas tertakluk kepada peruntukan s 9 dan, keduanya, tiada apa-apa dalam s 9(1)(d) yang menetapkan bahawa pemberitahuan itu hanya mempunyai kesan secara prospektif (lihat perenggan 31).

(5) PUS telah dilampirkan kepadanya surat ikatan itu, dan terma-termanya dengan nyata termasuk rujukan projek yang dilaksanakan oleh SUS dan di mana pegangan saham ekuiti pemilik-pemilik tanah NCR telah pun mengesahkan 30% daripada entiti tertentu. Plaintif-plaintif yang merupakan pihak-pihak kepada surat ikatan itu telah menyedari sepenuhnya fakta-fakta tersebut (lihat perenggan 38).

(6) 'Estoppel' telah ditimbulkan oleh PHSB, kerajaan negeri, BPB dan SUS kerana menentang tindakan yang dimulakan oleh plaintif-plaintif dan hakim telah menolak pembelaan semata-mata atas asas, bahawa estopel tidak boleh digunakan dalam transaksi yang menyalahi undang-undang yang dilarang oleh undang-undang atau bahawa apa-apa percubaan untuk mengkontrak keluar peruntukan statutori yang jelas akan menjadi tidak sah dan tidak berkuat kuasa keseluruhannya kerana bertentangan dengan polisi awam. Oleh kerana, kemasukan ke dalam surat ikaan itu oleh pemilik-pemilik tanah NCR tidak bertentangan dengan s 8 KTS, adalah diikuti bahawa pembelaan estopel dengan itu sedia ada dan terbuka kepada defendan-defendan. Plaintif-plaintif diestopkan berdasarkan fakta dan oleh persetujuan plaintif-plaintif dan kejadian berikutnya, dan oleh itu tidak berhak untuk diberikan relief yang dipohon oleh mereka (lihat perenggan 42–43 & 45).

(7) Tiada asas atas fakta untuk sampai kepada kesimpulan bahawa perlindungan dan hak-hak pemilik-pemilik tanah NCR telah dikurangkan kepada 'zero' atau telah 'relegated to nought' oleh aturan yang dimasuki dengan PHSB dan kerajaan negeri untuk membangunkan tanah NCR menjadi ladang kelapa sawit atas dasar kolektif. Keterangan di hadapan mahkamah jelas bertentangan (lihat perenggan 48).

(8) Tanah yang dipersoalkan adalah untuk dikekalkan sebagai 'native area land'. Sebagaimana terma-terma surat ikatan itu, di mana tanah itu telah pun diberi milik satu memorandum pajakan kecil akan dilaksanakan dan di mana satu dokumen hak milik akan dikeluarkan, ia akan dikeluarkan atas nama SUS tetapi untuk tempoh 60 tahun, yang mana selepas itu pemilik-pemilik tanah NCR mempunyai hak residual untuk memberi miliknya kepada mereka sendiri atau waris mereka yang diiktiraf. Sebagai

pulangan untuk aturan ini, pemilik-pemilik tanah NCR secara kolektif akan memegang 30% daripada saham terbitan dalam SUS, dibahagikan antara mereka mengikut perkadaran kepentingan masing-masing dalam keseluruhan tanah di bawah pembangunan itu. Kepentingan peribadi mereka dalam tanah itu akan berterusan dalam bentuk pegangan saham 30% dalam SUS itu, yang mana adalah untuk melaksanakan pembangunan dan pengurusan kelapa sawit yang diusahakan atas tanah NCR. Hakim terkhilaf untuk mengambil kedudukan bahawa plaintif-plaintif telah dinafikan sama sekali hak-hak dan perlindungan mereka atau hak-hak mereka yang telah diberikan sama sekali atau keseluruhannya kepada SUS itu (lihat perenggan 49–50 & 52).]

Notes

For cases on interpretation of agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5773–5774.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (distd)

Holee Holdings (M) Sdn Bhd v Chai Him & Ors [1997] 4 MLJ 601; [1997] 1 LNS 424, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Masa anak Nangkai and Ors v Lembaga Pembangunan dan Lidungan and Ors (judgment) [2011] MLJU 197; (2011) 1 LNS 145, HC (distd)

Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor [2002] 6 MLJ 236; [2002] 8 CLJ 751, HC (distd)

Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors [2008] 4 MLJ 567; [2008] 4 CLJ 143, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 20
Interpretation Ordinance 2005 ss 15, 16
Land Custody and Development Authority Ordinance 1985 s 3(2)
Sarawak Land Code (Cap 81) ss 8, 8(b), 9, 9(1)(d)

Appeal from: Suit No 21–7 of 2009 (High Court, Sibu)

Leslie Linton (Batternberg & Talma) in Civil Appeal No Q-02–1053–05 of 2012 for the appellants.

Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co) in Civil Appeal No Q-02–1054–05 of 2012 for the appellants.

JC Fong (Mcwillyn Jiok with him) (State Legal Advisor) in Civil Appeal No Q-01–282–06 of 2012 for the appellants.

Baru Bian (Simon Siah Sy Jen and Chua Kuan Ching with him) (Baru Bian & Co) in Civil Appeal Nos Q-02–1053–05 of 2012, Q-02–1054–05 of 2012 and Q-01–282–06 of 2012 for the respondents.

Varghese George JCA:

INTRODUCTION

[1] The three appeals before us arose from the same judgment delivered on 30 April 2012 by the High Court at Sibu in Suit No 21–7 of 2009.

[2] The respondents in the appeals were the plaintiffs at the High Court who had brought the action on their behalf as well as on behalf of others listed in the annexure to the statement of claim. They allegedly had a common interest and a common grievance against all the defendants.

In this judgment, they will be referred to as 'the plaintiffs'.

[3] The central issue surrounding this action was whether the plaintiffs' native customary rights over land at Sg Kelimut, Block D1, Kanowit District, measuring in area of about 1886.431 hectares ('the NCR land') had been infringed or abrogated by certain transactions that had taken place with respect to development of the NCR land.

[4] The first defendant (the appellant in Civil Appeal No Q-02–1054–05 of 2012) was wholly owned by the Land Custody and Development Authority ('LCDA'), a statutory body established under the Land Custody and Development Authority Ordinance 1985 ('the Ordinance'). The first defendant was incorporated under s 3(2) of the Ordinance and is hereafter referred to as 'PHSB'.

[5] The second defendant (the first appellant in Civil Appeal No Q-01–282–06 of 2012) was the authority charged with control and administration of land matters within the Government of Sarawak (the third defendant and the second appellant in Civil Appeal No Q-01–282–06 of 2012).

The appellants above will be referred to collectively as 'the state' in this judgment.

[6] The fourth defendant (the first appellant in Civil Appeal No Q-02–1053–06 of 2012) was a public listed company (previously known as Kuala Sidim Bhd) and will be referred hereafter as 'BPB'.

[7] The fifth defendant (the second appellant in Civil Appeal No Q-02–1053–06 of 2012) was the joint venture company incorporated by PHSB and BPB under the terms of a joint venture agreement between them. The fifth defendant (previously known as Kanowit Oil Palm Plantations Sdn Bhd) will hereafter be referred to as 'the JVC'.

THE HIGH COURT ORDERS

[8] The learned High Court judge at the conclusion of the trial made the following orders:

(a) A Declaration that the first and third defendants either jointly or severally were negligent in not ensuring that the third party and/or investor did their part as investor to profitably develop the said NCR lands as guaranteed by all the defendants to the plaintiffs;

(b) A Declaration that in view of the breach in trust of the first and third defendants vis a vis the plaintiffs as aforesaid, the principal deed dated 14 January 2002, between the plaintiffs and the first and third defendants and any agreement in connection thereto are deemed null and void;

(c) A Declaration order that the plaintiffs be given back their rights over the said NCR lands respectively and be allowed to carry on any activities on the said NCR lands with no order as to costs to the first defendant and/or any third party or investors for the development of the said NCR lands;

(d) The principal deed dated 14 January 2002, as between the plaintiffs and the first defendant is null and void and of no legal effect vis a vis s 8 of the Land Code (Cap 81);

(e) A mandatory injunction against the first defendant and/or its employees, servants, and/or agents to cease operations and remove all structures and their equipments or machineries from the plaintiffs' said NCR land within 15 days hereof.

[9] PHSB, the state, BPB and the JVC, being dissatisfied with all of the said orders, preferred respective appeals to us against that decision.

BACKGROUND

[10] It was not in dispute that the plaintiffs were Ibans by race and natives of Sarawak. It was also agreed that the land in question was rightfully subject to native customary rights as recognised in the Land Code (Cap 81)('the SLC').

[11] Salient developments (over which there was no serious dispute) in chronological sequence and as gathered from the evidence led before the court, were as enumerated below:

(a) the state in August 1996 launched a scheme, called the 'Project Pembangunan Tanah Adat Bumiputera Kawasan Kanowit' to develop NCR land into cultivated plantations in collaboration with the private sector with the objective of improving the socio-economic conditions of the native land owners in that locality;

(b) in 1997/1998 the NCR land owners including the plaintiffs, individually issued to the state separate 'memorandum of consent' ('the MOC'). The execution of the MOC by the landowners was witnessed by the 'Tuai Rumah' and a significant term therein found was the appointment of LCDA by the landowners as the 'managing agent' of their lands;

(c) on 6 May 1998 BPB entered into a joint venture agreement with PHSB ('the JVA') to develop the NCR land identified therein into an oil palm plantation. It was expressed in the JVA that LCDA had nominated PHSB to undertake the venture and PHSB was entering into the JVA as 'trustee' for the NCR land owners.

The JVA, inter alia, provided further that:

(i) the development project would be implemented through Kanowit Oil Palm Plantation Sdn Bhd (as the JVC was previously known); and

(ii) the shareholdings in the JVC would be in the following proportions:

PHSB	— 10%
KSB (as BPB was previously known)	— 60%
NCR landowners	— 30%

(iii) the JVC would hold a lease over the land for 60 years, whereafter the NCR land would revert to the NCR land owners,

(d) the preparation of the NCR lands for the intended oil palm plantation had however commenced in 1997 and the planting itself spanned over a period up to 2001;

(e) on 14 January 2002 an agreement titled 'Principal Deed' ('the deed') was entered into between the state, PHSB and all the relevant NCR land owners. The deed also recorded the respective 'proportion share of interest' in the land to which each of the land owners were entitled to, and further set-out the rights, duties and obligation as between the parties, vis a vis the development of the NCR land.

A copy of the JVA (6 May 1998) was also appended to the deed;

(f) pursuant to the Land (Dealing in Native Area Land)(Authorisation)(No 7) Direction 2011 (made under s 9(1)(d) of the SLC and the Delegation

of Powers (Dealing in Native Area Land) Notification 1995, the *Majlis Mesyuarat Kerajaan Negeri* declared that PHSB would be deemed to be a native of Sarawak effective from 1 December 1995. This decision was *gazetted* in Vol LXVI No 12 on 1 April 2011;

(g) pursuant to the Land (Dealing in Native Area Land)(Authorisation)(No 21) Direction 2011 (made under the same provisions cited above), the *Majlis Mesyuarat Kerajaan Negeri* had declared that the JVC would similarly be deemed to be a native of Sarawak effective from 6 May 1998. This decision was *gazetted* in Vol LXII No 31 on 11 October 2007.

Clause 5.1.2. of the JVA (6 May 1998) had specifically envisaged such status being obtained in due course for PHSB and the JVC; and

(h) the only returns or dividends that had been received by the NCR land owners since 1996 (or for that matter since 2002) were certain payments in 2008–2011, that too, after protests had been mounted by groups of land owners, who had complained that they had seen no returns in respect of their interest in the NCR land which had by then been fully planted and productive.

GROUNDS OF DECISION OF THE HIGH COURT

[12] The learned trial judge in her judgment observed that the plaintiffs' claim was founded in negligence, breach of trust, fraudulent representation, fraud and illegality and that it was also claimed that the plaintiffs had suffered loss and damages as a result of negligence of PHSB and/or the state. Further, that it had also been alleged by the plaintiffs that the state had fraudulently misrepresented that the joint venture with PHSB would reap profits for the plaintiffs.

[13] Against this backdrop the learned trial judge went on to hold that the deed (14 January 2002) had contravened s 8 of the SLC and was accordingly void. In this respect, it was stated in the judgment:

> By the clear provision of s 8 of the Land Code, subject to s 9 of the Land Code, a non-native is prohibited from acquiring any rights or privileges over native area land and any agreement purporting agreement conferring such rights or privileges as to allow a non-native enjoy such rights or privileges is deemed to have been entered for an illegal consideration.

[14] In arriving at the aforestated conclusion, the trial court took the position that the declarations by the *Majlis Mesyuarat Kerajaan Negeri* that PHSB and the JVC were deemed natives of Sarawak, that is, restrospectively from 1 December 1995 and 6 May 1998 (D2 and D3), respectively, did not save the situation as the deed was not a conditional agreement as contended for

by PHSB, state, BPB and the JVC. At paras 75 of the judgment, the learned trial judge went on to observe:

> On the contrary, the principal deed and the joint venture agreement have clearly stripped the NCR landowners of their rights and privileges in the NCR lands and the same are bestowed upon the fifth defendant, a non-native, incorporated as a vehicle to implement the oil palm plantation project. The intention of the principal deed and the JV agreement has clearly circumvented the prohibition in s 8 of the Land Code. For this reasons, I hold that they are illegal agreements.

[15] The learned trial judge then went on to note as follows:

> Does the restrospective effect of exhs D2 and D3 validate the illegality produced by the breach of s 8 of the SLC? I should think not. As stated earlier, the first defendant and fifth defendant were non-native when they acquired the right and privileges over the NCR landowners in contravention of s 8 of the SLC. That was illegal. To my mind, exhs D2 and D3 merely regulate their status by conferring the first defendant and the fifth defendant a native status. In absence of a validating clause to remedy and cure the actions which have produced the illegality, the illegality produced by breach of s 8 remains.

[16] It appeared to us that the learned trial judge was persuaded to hold as aforesaid, principally because even before the 'inking of the deed', as Her Ladyship noted, the JVC had already moved into the NCR land and had started to plant oil palm. Further, the JVC had already been incorporated and existent at the time the deed was executed, when according to the terms of the deed, the JVC, the vehicle to carry out the project was only envisaged to be incorporated subsequently.

[17] The learned trial judge also did not accept the contention of the defendants at the High Court that PHSB was a trustee or agent for the NCR land owners appointed by LCDA to develop the NCR lands in question together with BPB. In this regard it appeared that the court held that the arrangement entered into by the NCR land owners was rather an 'absolute assignment' of their rights. The observation of the learned trial judge in this respect was:

> ... it is vivid that under the principal deed, the NCR landowners' rights and privileges have been reduced to 'zero' as they have assigned them absolutely to the first defendant (a-non native), who then acquired the rights and privileges over the NCR lands which they have undertaken to develop into an oil palm plantation.

[18] At para 85 of the judgment, the learned trial judge further stated:

> The facts as alluded to in the above clearly show that even before the issue of exhs D2 and D3 which give native status to the first defendant and the fifth defendant, the fifth defendant had already entered the NCR lands and started cultivation and under the principal deed and the joint venture agreement, the rights and privileges

> of the NCR landowners were *relegated to naught* while the fifth defendant had acquired the rights and privileges of the native customary rights over the NCR land that they undertook to develop. (Emphasis added.)

[19] Following from that premise that the deed and the JVC were illegal, the learned trial judge went on to also reject the contention that equitable principles intervened in the circumstances of this instant case to estop the plaintiffs from now setting aside the development of the NCR land (an oil palm plantation) undertaken by the JVC and wanting the NCR land back to themselves. The learned trial judge in coming to that conclusion relied on the settled principal that estoppel could not be raised or invoked where it was intended to validate or countenance an illegal transactions which was clearly prohibited by statute and the law (*Holee Holdings (M) Sdn Bhd v Chai Him & Ors* [1997] 4 MLJ 601; [1997] 1 LNS 424).

[20] BPB and JVC on their part had raised the issue that if the plaintiffs were granted the claim, it would be in disregard of the fact that the plaintiffs stood to benefit from the already developed NCR land from which the plaintiffs would continue to derive profits. The contention was that the court should not in any case allow 'unjust enrichment' to the plaintiffs at the expense of BPB and the JVC, who had expended their monies for the development of the NCR land with the landowners as the ultimate beneficiaries.

[21] Although noting that dividends had been paid for the years 2008–2011, the learned trial judge went on to observe:

> A dividend of RM150 per hectare after almost 14 years (from the time the fifth defendant started planting on the native customary land in 1997) or almost seven years from the execution of the principal deed, is, by any standard a pittance.

The court then found no merits in the said defendants' contention of unjust enrichment as a ground to refuse the declaration or orders sought by the plaintiffs.

[22] It was also the finding of the learned trial judge that PHSB and the state government had a duty of trust in respect of the NCR land to the plaintiffs and accordingly owed a fiduciary duty to the plaintiffs and on the facts, PHSB and the state had failed, neglected and/or was in breach of trust stating:

> The first and third defendant have *breached their trust duty* as the development program on the NCR land *was a total failure* with no foreseeable opportunity of bring benefits or profit to the plaintiffs. (Emphasis added.)

Basically, the context of this finding was that the plaintiffs had a legitimate grievance, namely, that despite being promised that dividends will commence within four years after planting of the oil palm, the plaintiffs had been let down

by not receiving timely or adequate dividends despite the fact that they had been deprived of the use of the whole of their lands.

[23] Notwithstanding the above findings, the learned trial judge however held that the plaintiffs had not proved on a balance of probabilities that PHSB and/or the state, had committed any fraudulent misrepresentation to the effect that the joint venture (with the NCR landowners) would reap profits for the plaintiffs.

OUR DECISION

[24] Having given careful consideration to the submissions of respective counsel before us, we were of the unanimous view that learned trial judge had misappreciated the facts and had further misdirected herself on the relevant law in arriving at her conclusions and in granting the declarations and orders as the court did. This was a case that merited appellate intervention in the circumstances (*Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

The significance of the MOC

[25] For a start, it was glaringly evident that the learned trial judge had failed to give any or any sufficient consideration to the MOC, which as noted earlier, had been executed by the individual NCR land owners in 1996/1997.

Immediately following the launch of the state sponsored programme, the NCR land owners had in separate MOC addressed to the 'Government of Sarawak' expressly agreed to the development of their respective NCR land into an oil palm plantation. There was no suggestion (in the pleadings or otherwise) nor was any evidence led to show that the execution of the MOC by the NCR landowner concerned was made under duress or by way of any deception perpetrated on them.

[26] The following formed the material part of the contents of the MOC:

> 2. I hereby acknowledge and declare that: —
>
> (a) I agree to have my said NCR land developed, under the State Government Scheme for NCR land development, to an oil palm plantation;
>
> (b) the development of my said NCR land be undertaken with other NCR land in the vicinity of my NCR land;
>
> (c) I recognise, and agree to have, Lembaga Pembangunan dan Lindungan Tanah ('PELITA') as the *managing agent* for the development of my NCR land;

(d) the development of my NCR land together with the other parcels of NCR land into an oil palm plantation shall be undertaken by a Joint Venture Company ('JVC') jointly owned by *KUALA SIDIM BERHAD ('KSB') and PELITA as beneficial owner and as trustee for myself and other persons having rights over other parcels of NCR land*.

3. To facilitate the development of my NCR land, and pending the completion of the required survey of all the NCR land involved in the development of the aforesaid palm oil plantation, and the execution of all necessary documents in relation thereto. I hereby agree that: –

(a) the JVC or its authorised officers, agents or servants *may enter my NCR land for the purpose of carrying out all incidental works relating* to the said development thereto, including undertaking survey, soil tests, ground preparation works;

(b) the JVC *may occupy my said NCR land for the purposes* set-out in paragraph (a) above; and

(c) I will execute, sign and deliver all documents required by PELITA or the State Government to signify and confirm my participation in the development of an oil palm plantation by the JVC on my said NCR land and other NCR land in the vicinity thereof.

(Emphasis added.)

[27] This was a significant document and in a sense the genesis of the relationship with respect to the development of the individual pieces of the NCR land on a collective basis. While in law a contract reduced into writing had to be construed objectively, it was still recognised that the background that led to the entry of the private contract could also be relevant and taken into consideration nevertheless.

In *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, the Federal Court per Gopal Sri Ram FCJ noted:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. *First*, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. *Second*, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. *Third*, the interpreting court must disregard any part of the background that is declaratory of subject intent only. *Lastly*, the court should adopt an objective approach when interpreting a private contract. (Emphasis added.)

[28] The consent and authorisation given by the NCR land owners by way of the MOC was a material fact that constituted the background to the physical entry into and subsequent development of the NCR lands by the JVC. It also

put into proper perspective the subsequent JVA and the deed that had been entered and it was relevant as well for a judicious appreciation of the terms of the deed in particular, that is, within the wider context of the provisions of the Ordinance and the state sponsored plans for development of NCR lands for the benefit of NCR landowners.

Sections 8 and 9 of the SLC

[29] In striking down the deed as being illegal for contravention of s 8 of the SLC (particularly s 8(b)), the learned trial judge took the position that the saving provisions of s 9(1)(d) allowing for a non-native to be deemed a native by order of the *Majlis Mesyuarat Kerajaan Negeri could only apply prospectively and not retrospectively*; hence the finding of the court that the Directions Nos 7 and 21 (exhs D2 and D3) were ineffective as on the date the deed was executed by the NCR land owners, neither PHSB nor for that matter the JVC were natives or deemed as natives under the SLC. (Emphasis added.)

[30] Sections 8 and 9 of the SLC in so far as was material for our consideration is reproduced here:

8 Save as provided in section 9 —

(a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;

(b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to paragraph (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised *has* not been paid or furnished;

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

Acquisition of land by non-natives

9(1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or for any rights or interest in or over such land —

(a) ...

(b) ...

(c) ...

(d) where such non-native has been deemed to be a native, by the Majlis Mesyuarat Kerajaan Negeri, by notification in the Gazette, in respect of any category of dealing over Native Area Land as stipulated in the notification;

(e) ...

(2) ...

(Emphasis added.)

[31] We were in agreement with the submissions of learned counsel Datuk JC Fong for the state that the *gazetted* Directions (D2 and D3) in so far as it deemed PHSB and JVC as natives had validity retrospectively. Firstly, the prohibitions vide s 8 were expressly subject to the provisions of s 9 and, secondly, there was nothing in s 9(1)(d) which stipulated that the notification thereunder was only to have effect prospectively.

[32] It had to be also appreciated that the 'notifications' in question were definitely a piece of subsidiary legislation falling squarely within the definition found in the Interpretation Ordinance 2005 (Cap 61), namely:

'Subsidiary legislation' means any regulation, order, Proclamation, or other instrument made under any written law and having legislative effect.

Further, s 16 of the same Ordinance (Cap 61)(in force since 1 July 2005) and s 15 of the Interpretation Ordinance (in force from 23 May 1953) in identical terms provided that:

Whenever *by or under any written law* power is given to the Majlis Mesyuarat Kerajaan Negeri, the Yang di-Pertua Negeri or any public officer or body or other authority (in this section referred to as 'the authority empowered') to make subsidiary legislation or to make, issue or approve any order, Proclamation, instrument, *declaration*, direction, instruction, *notification*, register or list, it shall include the power of amending or suspending that subsidiary legislation, order, Proclamation, instrument, declaration, direction, instruction, notification, register or list, or withdrawing its approval, in the same manner as it was made, approved or issued, and shall, *notwithstanding the absence of any express provision in any Ordinance* or other written law, where that Ordinance or other written law empowers any person to make subsidiary legislation, include *the power of declaring the date (including a date prior to that upon which it is so declared) as from which it shall* have or be deemed to have had effect, the period of its operation and of substituting another for it. (Emphasis added.)

(See also s 20 of the Interpretation Act (Act 388) amended by Act A996 in 1967

— Subsidiary Legislation may be retrospective).

[33] Further, the obtaining of a notification pursuant to s 9(1)(d) of the SLC vide the Delegation of Powers (Dealing in Native Area Land) Notification 1995 (Swk LN 55) for the JVC to be deemed a native company was within the contemplation of all parties as was clearly evident from cl 5.1.2 of the JVA and also from cl 3 of the deed itself.

There was therefore obviously no intention to contravene or bypass the law by any of the parties concerned and the arrangements freely entered into was subject to compliance with requirements of the law.

[34] The Court of Appeal speaking through James Foong JCA (as he then was) in *Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors* [2008] 4 MLJ 567; [2008] 4 CLJ 143 have authoritatively in this respect stated:

> When an agreement contains terms that require compliance with statutory provisions then such an agreement cannot be void for illegality.

The deed provided for compliance with the statutory requirements.

[35] In our assessment therefore the learned trial judge had misdirected herself on this pivotal question of law when she held that the notification/direction (exhs D2 and D3) could not have valid retrospective effect and that the deed entered into by the NCR landowners, was void for illegality.

JVC

[36] The question then was whether this position in law would have been any different given that in the particular factual matrix of the case at hand, the JVC had already been incorporated and more tellingly the NCR lands had been entered into and cultivated by the planting of oil palm trees even before the deed was executed by the parties in January 2002.

It was the submission of Mr Baru Bian, learned counsel for the plaintiffs that what was envisaged by the terms of the deed was a joint venture company *to be incorporated* rather than the JVC that was already in existence at that date.

[37] Learned counsel for the plaintiffs relied in this regard on the definition of 'Company' as found in cl 1 of the deed, namely, in the following terms:

> 'Company' means a Company *to be incorporated*, pursuant to the terms of the said Agreement, by PHSB (as Trustee for NCR owner) and the Developer, for the commercial development of the said land into an oil palm plantation. (Emphasis added.)

(The term 'the said agreement' in the definition referred to the JVA (6 May 1998) which was annexed to the deed itself as Appendix C).

[38] It was our considered view however that the omission in the deed to spell out more particularly that the JVC was already in existence did not by way of consequence or in any other manner, mislead the parties so as to provide a valid ground to vitiate the contract entered into. As noted above, the JVA was annexed to the deed, and its terms expressly included reference to the project being implemented by a joint venture company identified as Kanowit Oil Palm Plantation Sdn Bhd (as the JVC was then known) and wherein the NCR landowners' equity shareholding was duly acknowledged to be 30% of that specific entity. The plaintiffs who were parties to the deed were fully cognisant of these facts.

[39] Further it must be stressed that the JVA closely followed the execution of the individual MOC by the NCR landowners (1997/1998) which as highlighted above, acknowledged and declared, inter alia:

> 2(d) the development of my NCR land together with the other parcels of NCR land into an oil palm plantation shall be undertaken by a Joint Venture Company ('JVC') jointly owned by *KUALA SIDIM BERHAD ('KSB') and PELITA as beneficial owner and as trustee for myself and other persons having rights over other parcels of NCR land*.

and

> 3. To facilitate the development of my NCR land, *and pending the completion of the reguired survey* of all the NCR land involved in the development of the aforesaid palm oil plantation, and the execution of all necessary documents in relation thereto. I hereby agree that:-
>
> > (d) the JVC or its authorised officers, agents or servants *may enter my NCR land for the purpose of carrying out all incidental works relating* to the said development thereto, including undertaking survey, soil tests, ground preparation works;
> >
> > (e) the JVC *may occupy my said NCR land for the purposes* set-out in paragraph (a) above; and
> >
> > (f) I will execute, sign and deliver all documents required by PELITA or the State Government to signify and confirm my participation *in the development of an oil palm plantation* by the JVC on my said NCR land and other NCR land in the vicinity thereof.
>
> (Emphasis added.)

[40] As also commented above, the *deed* (though executed in 2002) incorporated the respective 'Proportion of Share of Interest in the said land' of the individual NCR landowners. Understandably, the survey contemplated and agreed to in cl 3 of the MOC had taken some time to be completed (as it

would appear) before the deed was finally executed by the parties.

[41] In the circumstances, the effect sought to be advanced by counsel for the plaintiffs that there had been bad faith or misrepresentation (vis a vis the JVC's existence or functions) was wholly negatived by the sequence of events and contemporaneous documentary material which supported the scenario of a single uncontradicted flow in the contractual relationship between the parties, originating with the MOC, then the JVA and finally the deed in respect of the development of the NCR lands in question. This contention of the plaintiffs with respect, bordered on the pedantic and was unrealistic given the overall situation at hand, which was known and acknowledged by the plaintiffs themselves.

Estoppel

[42] 'Estoppel' had been raised by PHSB, the state, BPB and the JVC in resisting the action brought by the plaintiffs and the learned trial judge had rejected that defence solely on the basis, that estoppel could not be invoked 'in an illegal transaction prohibited by law or that any attempt to contract out of clear statutory provisions will be void and wholly ineffective as being contrary to public policy' (*Holee Holdings (M) Sdn Bhd* case).

[43] Flowing from the conclusion that we have now reached as discussed above, that the entry into the deed by the NCR landowners was not in contravention of s 8 of the SLC, it followed that the defence of estoppel was therefore available and open to the defendants.

[44] The law on estoppel has been clarified by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 where it was held as follows:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless ...
>
> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. The plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russel of Killowen in *Dawsons Bank v Nippon Menkwa KabushikiKaisha* LR 62 IA 100, 108:
>
> > Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of same facts essential to establish the cause of action or (to put) it in another way

by preventing a defendant from asserting the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non existence of a fact.

The decision of the Privy Council in *Sarat Chunder Dey and the Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representation not of fact but of law.

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the amoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. *All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law* — whether due to misrepresentation or mistake makes no difference — *on which they have conducted the dealings between them — neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so*. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands. (Emphasis added.)

[45] On that premise, our conclusion differed from the learned trial judge on this issue of the equitable principle of estoppel being successfully invoked in this case. We were of the view that the plaintiffs were estopped on the facts and by the plaintiffs' own acquiescence and consequent events, and thereby were not entitled to be granted the relief sought by them in this action, in any event.

The plaintiffs' right over NCR land — reduced to 'zero'

[46] The learned trial judge had variously in the judgment observed that:

(a) ... the deed and JVA had clearly stripped the NCR landowners of their rights and privileges in the NCR land ...;

(b) ... it is vivid that under the principal deed, the NCR landowners' rights and privileges have been reduced to 'zero' as they have assigned them absolutely to the first defendant (PHSB) (non-native), who then acquired the rights and privileges over the NCR lands which they have undertaken to develop into an oil palm plantation; and

(c) ... under the principal deed and the joint venture agreement, the rights and privileges of the NCR landowners were relegated to naught while the

fifth defendant (JVC) had acquired the rights and privileges of the native customary rights over the NCR land that they undertook to develop.

[47] The learned trial judge also held that in the particular context of control and administration of land with native customary rights attached to it, the state owed a 'fiduciary duty' to the NCR landowners and in this instant situation the PHSB and the state had breached their fiduciary and trust duties as '... the development program on NCR Land was a total failure with no foreseeable opportunity of bring (sic) benefit or profit to the Plaintiffs ...'.

[48] In our view however, there was no basis on the facts to arrive at those conclusions, as the learned trial judge did, namely, that the privileges and rights of NCR landowners had been reduced to 'zero' or had been 'relegated to nought' by the arrangements entered into with PHSB and the state to develop the NCR lands into an oil palm plantation on a collective basis. The evidence before the court was obviously to the contrary.

[49] The land in question was to remain a 'native area land'. As per the terms of the deed, where the land had already been alienated a memorandum of sublease would be executed and where a document of title was to be issued, it would be issued in the name of the JVC but for a term of 60 years, whereafter the NCR landowners had the residual right to have it alienated to themselves or their recognised heirs (cll 2(c) and 7 of the deed).

Clause 12.1 of the deed specifically provided also as follows:

> 12.1 The NCR Owners shall have the right, upon the expiry of the term of 60 years during which the said land is registered in the name of the Company, to make request to the Government not later than 24 months before the expiry of the said term, for the said land to be alienated to them or be re-alienated to the Company or to another company or entity agreed upon by the NCR Owners.

[50] In return for this arrangement, the NCR landowners would collectively hold 30% of the issued shares in the JVC, divided amongst them in proportion to their respective interest in the overall land under development (see cll 11.3 and 11.5 of the deed). Their personal interest in the land would continue in the form of shareholders with a 30% stake in the JVC, which was to undertake the development and management of the oil palm cultivated on the NCR land.

[51] The following testimony of DW3 under cross-examination was also pertinent in respect of the plaintiffs' expected and derived return on their shareholding in the JVC:

> Q290: Would it be correct to say that before 2024, the 5th defendant would not be able to pay any dividend of whatsoever to the participants in this project?

A: Not correct. It would be able to pay dividend. When I say break even, it meant that the project would have zero loss. That is whatever loss the project incurred in the past would be fully recovered.

Q291: When do you think the 5th defendant be in the position to pay dividend to participants of this project including the plaintiffs in this case?

A: It would be in the position to pay dividend even for a financial Year 2011 because up to month of September 2011, the company has made profit of RM28 million. According to the Company Act, there is no need to make good the past losses before paying dividends.

Q292: Are you aware as a chief financial officer whether the 5th defendants have ever paid any dividends to the plaintiffs in this case?

...

A: The 5th defendant have paid advance interim dividends to the NCR land owners which I believe include the plaintiffs.

Q293: When was that?

A: This is paid sometime in 2008, 2009, 2010 as well as 2011.

Q294: Would you be able to tell the court how much total paid to the respective years?

A: In 2008, the amount was RM1.393 million. In 2009, the figure was RM 1.678 million. In 2010, RM1.699 million. In 2011, the figure was about RM3.4 million.

Q295: Were all these sums of money paid to the plaintiffs?

...

Q296: Were all these sums of money paid to the NCR landowners who participated in the project?

A: Yes.

Q297: Would you be able to tell the court, how much each NCR owner was paid per hectares?

A: For the Year 2008, it was RM100 per hectares for all estates, except for Kelimut Estate. RM250 per hectares were paid to the participants of the project in Kelimut Estate. In 2009, the figure was RM150.00 per hectares. In 2010, it was RM150 as well. In 2011, RM300 per hectare. The amount is the same for all the estates.

[52] In the light of the above, the learned trial judge was clearly in error to take the position that the plaintiffs had been deprived totally of their rights and privileges outright or their rights have been assigned out absolutely or wholly to the JVC. Although by cl 4.1(b) of the deed the NCR landowners agreed to '...

assign absolutely to PHSB as Trustee of their respective interests, rights, shares and estates in the said land', it is noteworthy that at cl 3 of the trust deed that this 'assignment' was clearly circumscribed in the following terms:

> The trust shares or any of them shall not be sold, charged, pledged or otherwise encumbered by PHSB save except in accordance with the provisions of the Principal Deed and provided always that any such sale, pledge, charge or dealing must be approved by not less than two-thirds of the NCR owners who are named as parties to the Principal Deed.

[53] Of course, there could arise issues as to the regularity or adequacy of dividend payments or other perceived hurdles as to the enforcement of the rights granted to the NCR landowners under the deed, the trust deed and other agreements, but that was another matter to be pursued in, perhaps, complaints or proceedings as the case arose through other appropriate forum. Surely, they were not grounds enough to set aside and nullify the deed.

[54] Learned counsel for the plaintiffs (as was also argued before the court below) cited the decision of the courts in the following cases, purportedly in support of the plaintiffs' case:

(a) *Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor* [2002] 6 MLJ 236; [2002] 8 CLJ 751; and

(b) *Masa anak Nangkai and Ors v Lembaga Pembangunan dan Lidungan and Ors (judgment)* [2011] MLJU 197; (2011) 1 LNS 145.

[55] In the *Masa anak Nangkai* case, the plaintiffs there *were not parties* to the principal deed that had been entered into with one group of NCR land owners, described as 'First Batch NCR Owners' and their specific complaint there was that their portions of native customary land had been trespassed upon by one Tetangga Arkab Pelita (Pantu) Sdn Bhd (the joint venture company between PHSB and Tetangga Arkab Sdn Bhd) without their authority.

The outcome (recognition of NCR rights, damages to be assessed) in *Masa anak Nangkai* was based on differing set-of facts specific to that case where the plaintiff had chosen not to participate in the development project. In the case before us the plaintiffs had expressly consented to the JVC entering upon and developing their NCR land by virtue of the MOC and the deed as has been highlighted previously in this judgment.

[56] The controversy in *Pawa ak Ajah* centered on a divestment of interest in a native area land done by way of a *power of attorney*. It was held there that the subject power of attorney to inter alia sell, rent, lease, charge or mortgage or convert the title, was in contravention of s 8 of the SLC. Hence it was the use of a power of attorney to circumvent the law that was held to have the effect of

defeating the provisions of s 8 of the SLC.

[57] Both the aforesaid cases cited by the plaintiffs' counsel were therefore distinguishable on the facts and issues involved. They were clearly not of any assistance to further the plaintiffs' contention in the case on appeal before us.

CONCLUSION

[58] In the result, for the reasons stated and discussed above, we allow the appeal of the several appellants and order that the declarations listed as (i), (ii), (iii), (iv), (v) and (vii) in the judgment of the High Court dated 30 April 2012 (at pp 14–16 of Vol 1 of 16 record of appeal), be set aside.

As there was no appeal against the High Court's decision to dismiss the counterclaim of BPB and the JVC, we will not disturb that finding.

[59] In the particular circumstances of this case, it is also our view that it would not be fair to impose the burden of costs of the action upon the plaintiffs. Accordingly each party is ordered to bear their own costs.

Appeal allowed with no order as to costs.

Reported by Kanesh Sundrum